

EXHIBIT 3

McKoy, et al., v. The Trump Corporation, et al., Case No. 1:18-cv-09936 (S.D.N.Y)

Expert Report of Michael Gartenberg

November 18, 2022

Confidential – Subject to Protective Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CATHERINE MCKOY, MARKUS FRAZIER,
and LYNN CHADWICK, individually and on
behalf of all others similarly situated

Plaintiffs,

v.

THE TRUMP CORPORATION, DONALD J.
TRUMP, in his personal capacity, DONALD
TRUMP JR., ERIC TRUMP, and IVANKA
TRUMP,

Defendants.

No. 1:18-cv-09936-LGS

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9. The research methods that I used to conduct my assignment required the compilation, evaluation, and analysis of facts and data available to me, including publicly available market data from U.S. government sources and industry participants, articles from public media, and product reviews on the Internet. This is the type of information that I have regularly relied on to provide research analysis to clients throughout my career as a personal technology analyst. I also reviewed and analyzed documents produced and deposition testimony provided during discovery in this case. The research methods that I used to conduct my assignment are reliable, valid, and of the type used by leading IT research and advisory firms in practice.

III. Summary of Opinions

10. Applying the methods I describe above, in my expert opinion, ACN's videophone was not a commercially viable personal technology product at any point during the period it was offered from 2006 through 2015. Based on my review of consumer technology product market trends, there was never a market for a desktop-based videophone such as ACN's at any point from 2006 through 2015 because such desktop videophones were continually eclipsed and outperformed by other products throughout the period, as outlined below:

- In 2006, when ACN launched its videophone, there was virtually no market for desktop videophones, notwithstanding the efforts of multiple competitors. By the time the first ACN videophone was introduced in 2006, desktop videophones were already available to U.S. consumers but had failed to achieve any meaningful traction in the market, which illustrates both that desktop videophones were not a new idea and that consumers did not want them. In contrast, Skype launched video calling via desktop computer software in 2006 and already had 6 million registered users in the U.S. that year. As a new entrant into this market environment, ACN's videophone was dead on arrival because consumers already had easy access to broadband and had widely adopted personal computers that would allow them to take advantage of Skype and other peer web-based video calling options that only proliferated and improved from 2006 onward.

- Indeed, after 2006, the market environment only became less welcoming to desktop videophones like ACN's as the adoption of personal computers, broadband speeds, and the quality and adoption of alternative computer-based video calling options, such as Skype and Google Talk, further increased. In the late 2000s and early 2010s, laptops with built-in webcams and Wi-Fi connectivity increasingly eclipsed desktop computers, further easing consumers' ability to make high-quality video calls on their laptops from the convenience of wherever they were sitting, rendering a wire-tethered desktop product like ACN's videophone even less competitive than it already was.
- Later in the 2000s, smartphones began to take the consumer technology sector by storm, and cellular broadband networks became more commonplace in the U.S. market over a period stretching into the early-and mid-2010s. These trends further reinforced the non-existent commercial prospects of a product like the ACN videophone, given that, by no later than 2011, the technology was in place for consumers to place Skype or FaceTime video calls from their smartphones using Wi-Fi as they walked around their house, or even down the street using cellular data networks by 2012.

11. Moreover, even if there had been a market for desktop videophones from 2006 through 2015 (which there was not), ACN's videophone was unappealing to U.S. consumers due to several design flaws inherent to the product itself. Specifically, ACN's videophone: (a) could only be used to place video calls to other ACN videophones, which dramatically limited its consumer appeal; (b) was awkward to use and needed to be plugged into both an ethernet modem and a power source, which meant it could not be used for impromptu, high-quality video calls from anywhere in one's home or office; (c) was technologically inferior and difficult to use; and (d) was not remotely cost competitive relative to other competing video calling services at the time such as Skype, nor did it offer anything approaching the same scope of functionality and level of convenience that similarly priced smartphones offered later on.

12. As to the second question I consider in this report, I conclude that ACN's videophone generated minimal industry and consumer interest and failed to achieve any market success from 2006 through 2015, which is unsurprising, and indeed expected given the market